SUPREME COURT, U.S.
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No. 05

In the Supreme Court of the United States

INTERA CORPORATION AND
INTERA TECHNOLOGIES INC.,
Petitioners,

v.

GEORGE HENDERSON, III; JOHN ENGLAR;
NANO-TEX, INC., a/k/a NANO-TEX, LLC,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where defendants who are situated entirely outside the State of Tennessee engage in intentional conduct, under circumstances where they reasonably know the out-of-state activity will cause damage to a Tennessee business, may the non-Tennessee defendants be sued in Tennessee courts pursuant to the provisions of the Tennessee "long-arm statute," *Tennessee Code Annotated* § 20-2-214(c).

PARTIES TO PROCEEDING

Petitioner Intera Corporation is a close corporation organized under the laws of the State of Tennessee, in which the Ted A. Mallen Family Trust is the major (92%) shareholder. Intera Technologies, Inc. is a subsidiary corporation of Intera Corporation. Other minimal shareholders are as follows: Estate of Muriel G. Mallen; James E. Klopman; Ival J. Goldstein; Brad J. Goldberg; and Lori J. Yarom. George Henderson, III and John Englar are individuals who reside in the State of North Carolina. Nano-Tex, LLC and Nano-Tex, Inc. are businesses organized in the State of North Carolina, and owned by George Henderson, III and John Englar.

RULE 29.6 STATEMENT

Intera Corporation and Intera Technologies, Inc. are Tennessee corporations organized and existing under the laws of the State of Tennessee, with principal offices located at 4301 Founders Way, Building C, Chattanooga, Tennessee 37422.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Intera Corporation and Intera Technologies, Inc. (hereinafter "Intera") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Sixth Circuit Court of Appeals is published at 428 F.3d 605 (6th Cir.).

JURISDICTION

The United States Sixth Circuit Court of Appeals issued its opinion on November 10, 2005, in which it affirmed in part, and reversed in part, the decision of the trial court from the United States District Court for the Middle District of Tennessee at Nashville. Jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The circumstances under which a state court may exercise "long-arm" personal jurisdiction over individuals or businesses who are situated entirely outside the state remains unsettled. Despite some clarification in case law, the uncertainty in the application of *in personam* jurisdiction to individuals who have never visited a state, and who have engaged in activities entirely outside of the forum state has produced inconsistent trial level and appellate decisions, particularly in instances in which the Defendants have no contacts with the state, but purposefully and foreseeably intended to cause effects within the foreign state.

In the present matter, the dispute arises from the conduct of two North Carolina residents, George Henderson, III and John Englar. Henderson and Englar are executives with the Burlington Industries Corporation. At all times pertinent to the complaint allegations, Henderson and Englar were situated in the State of North Carolina. As Burlington executives, Henderson and Englar, as part of their duties for Burlington, came into contact with Intera, a Tennessee corporation. Burlington, in contracts negotiated with Intera, had contracted with Intera for certain specialized textile treatment information and services. The contracts, in which Henderson and Englar participated, recognized the secrecy and confidentiality of Intera's trade practices and technical "know how." The contract between Burlington and Intera contemplated a Tennessee court forum in the event of any breaches or disputes.

Henderson and Englar secretly (on their own, independent of any connection to Burlington) created their own North Carolina company, operating under the name of "Nano-Tex." Nano-Tex had no direct contacts with the State of Tennessee or Intera. However, Nano-Tex is alleged to have adopted the confidential technological processes which Intera had entrusted to Henderson and Englar through their positions as Burlington executives. It is claimed by Intera that, through the Defendants' access to the contract information between Intera and Burlington, Henderson and Englar conspired to fraudulently take the information and utilize it for their own personal profit under the Nano-Tex identity. Once the technological processes had been gained by the Defendants, the Defendants then contacted other customers of Intera (in states other than Tennessee) and persuaded those companies to breach their technology agreements with Intera by transferring that business to their new company, "Nano-Tex."

It is conceded that Henderson and Englar physically conducted none of the foregoing activities within the State of Tennessee, and, further, that Henderson and Englar were not individual signatories on the contract between Intera and Burlington. Henderson and Englar were involved in the Burlington contract only as employees of Burlington who assisted in the effecting of the contractual provisions for their employer, thereby gaining access to the secret technological information regarding textile substrates. No telephone calls were placed to Tennessee in furtherance of the conspiratorial conduct, and no direct contact with the state has been alleged by the Plaintiffs. On the contrary, Plaintiffs have asserted proper application of the Tennessee "long-arm statute" upon the claim that the Defendants, while engaging in their North Carolina conspiratorial activities, knew with reasonable certainty that those activities would have a damaging effect upon the Tennessee Plaintiffs.

REASONS WHY THE WRIT SHOULD BE GRANTED

Since the announcement in 1945 of the Court's decision in *International Shoe Company v. Washington*, 326 U.S. 310 (1945) the conduct of interstate commerce has produced a variety of both specific and general circumstances in which it has been recognized that the due process clause of the United States Constitution will permit a defendant to be haled into a state court's jurisdiction where that defendant has been shown to have purposefully availed itself of the privilege of doing business within the state, and when it is reasonable to exercise that jurisdiction under the facts and circumstances of a particular case.

The granting of the petition is supported by significant policy considerations which extend beyond the narrow factual context of the present case.

In an era in which competitive technological changes out pace the cautious progress of the law, internet-based commerce presents, in another context, a realistic example of new opportunities for "purposeful availment," without direct or regular contacts with the state. For example, in 2001 the United States District Court for the Northern District of California (*Yahoo, Inc. v. LaLigue*, 145 F. Supp. 2d 1168 (U.S.D.C. CA. 2001)) considered a request by a French corporation to dismiss (based on lack of personal jurisdiction) Yahoo's ". . . novel legal issues arising from the global nature of the Internet." Construing this Court's decision in *Reno v. ACLU*, 521 U.S. 844, 138 L. Ed. 2d 874, 117 S.Ct. 2329 (1997), the trial court denied the French corporations motion to dismiss, finding that Yahoo had made a sufficient *prima facie* showing of purposeful availment under the "effects" tests. With no showing of a physical presence by the defendant in the State of California, and no direct, traditional contacts, the demonstration of conduct which intentionally affected property interests within the State of California was deemed sufficient in disallowing the defendant's motion to dismiss. In *Yahoo*, the defendant was alleged to have "knowingly engaged in actions intentionally targeted at the plaintiff's headquarters for the express purpose of causing the consequences of such actions to be felt in the foreign state." While those actions were taken in the context of Internet activity, the legal concept is exactly the same as in the present case. The scope of that application remains unsettled.

In the present matter, the Sixth Circuit Court of Appeals has affirmed the trial court's determination that (in the context of *Southern Machine Company v. Mohasco Industries, Inc.*, 401 F.2d 374 (6th Cir. 1968)) the Plaintiffs have not alleged conduct which is sufficient to demonstrate that the North Carolina plans and activities of Henderson and Englar would constitute "purposeful availment" to make reasonable the

exercise of Tennessee court jurisdiction based upon that North Carolina conduct. The appellate court decision to affirm the trial court's dismissal of the claim is based upon the Plaintiffs' concession that no agent acted within this state on behalf of Henderson or Englar.

The question is whether Henderson and Englar's exploitation of the Intera "Tennessee" contract with Burlington, in the context of their roles as Burlington agents, provides a sufficient nexus to permit litigation of the alleged fraudulent conduct in Tennessee courts.

Tennessee Code Annotated § 20-2-214 permits the exercise of long-arm jurisdiction upon ". . . any basis not inconsistent with the constitution of this state or of the United States." It further permits exercise of jurisdiction against any person who ". . . shall be deemed to have submitted to the jurisdiction of this state and who acts in the manner above-described through an agent or personal representative."

The Tennessee Supreme Court has expanded that concept to apply to several out-of-state defendants (who engaged in out-of-state activities) but where one of the conspirators had direct contacts within the State of Tennessee. *Chenault v. Walker*, 36 S.W.2d 45 (Tenn. 2001).

Whether the presence of the subject matter of the offended property right within the State of Tennessee is sufficient (based upon the "effects" test) to satisfy the requirements of due process remains unanswered. Otherwise stated, the confidential property rights which were created under the terms of the Tennessee contract comprised a *res*, as an asset or thing of value which came into existence within the State of Tennessee through the existence of the Tennessee contract. The Defendants fraudulently took that "thing of value"

knowing how it was created, and understanding the resulting damage to a Tennessee business.

The Plaintiffs' complaint directly alleges fraudulent, conspiratorial conduct by the Defendants in the State of North Carolina. *Chenault* provides no direct guidance in the resolution of the present issue, although it is of some assistance in understanding how the Tennessee Supreme Court has analyzed unlawful conduct outside of the state which would have reasonably foreseeable consequences within the state:

> "This theory holds that an out-of-state defendant involved in a conspiracy, who lacks sufficient "minimum" contacts with the forum state may nevertheless be subject to jurisdiction because of a co-conspirator's contacts with the forum." 36 S.W.3d 45 at p. 51.

Although no "co-conspirator" has acted within the State of Tennessee in the present matter, the prerequisites of reasonableness and foreseeability are established by the allegation of fraudulent, conspiratorial conduct directed toward the misappropriation of contract rights created through the vehicle of a Tennessee contract.

Concisely stated, it is the Petitioners' respectful position that an analysis of the conduct of a defendant in a long-arm/personal jurisdiction issue has evolved gradually from the concept that purposeful, physical presence within the state is necessary, to recognize that purposeful, targeted, conspiratorial efforts by an out-of-state defendant, shown to be intended to impact upon a Tennessee company, should be actionable in Tennessee courts. The concept is consistent with the traditional

concern that such exercise does not offend traditional notions of fair play and substantial justice.

Worldwide Volkswagen Corporation, et al. v. Woodson, 444 U.S. 286; 100 S.Ct. 559; 62 L. Ed. 2d 490 (1980) is an example in which the court declined to broaden the application of long-arm jurisdiction to a products liability case in which it was noted that national sales of a vehicle would not be sufficient to extend to Oklahoma's long-arm statute. Claims against the New York retailer and wholesale distributor were dismissed since there was no direct connection with Oklahoma, and the mere chance of the occurrence of the accident in Oklahoma was deemed an insufficient contact.

Conversely, *Calder v. Jones*, 465 U.S. 783; 104 S.Ct. 1482; 79 L. Ed. 2d 804 (1984), represented a broadening of the long-arm concept to a case in which Florida residents were permitted to be sued in the State of California, although they had no direct contacts with California. It was shown that a libelous article (written and published in Florida) would reasonably be construed as a knowing, intentional impact upon the California resident, because of the magazine's large circulation in that state. The ruling in *Calder* is not based upon the wide circulation in California, but upon a recognition of the apparent, purposeful targeting of the California resident by the authors of the Florida article. "Jurisdiction over petitioners is therefore proper in California based on the "effects" of their Florida conduct in California." 465 U.S. 783, at 789.

Recently, a trial level United States District Court Tennessee decision, *Bailey v. Turbine Design, Inc.*, 86 F. Supp. 790 (U.S.D.C. W.D. Tenn. 2000) considered a complaint by a Tennessee resident regarding a non-resident defendant's conduct in the posting of alleged defamatory statements on the defendant's Internet website. The trial court

declined a finding of personal jurisdiction on the question of purposeful availment, concluding that the defamatory actions were not expressly aimed at Tennessee because the plaintiff was not attacked as a Tennessee businessman. The Court considered the substance of the dispute between the Tennessee resident and the non-resident defendant, and concluded that the personal issues were not directly tied to any direct connection to activities within the State of Tennessee. That analysis is interesting, in considering the present matter, because the trial court's analysis was focused, in determining purposeful availment, upon the subject matter of the dispute. In contrast to the *Bailey* result, Intera's dispute with Henderson, Englar and Nano-Tex is based upon the very subject matter of the misappropriated interests: (a) a Tennessee contract; (b) to which the Defendants had access as a result of their agency relationship with Burlington; which (c) created the secret, confidential, proprietary rights which were eventually taken by the North Carolina Defendants.

The Court's ruling in *Burger King Corporation v. Rudzewicz*, 471 U.S. 462; 105 S.Ct. 2174, 85 L. Ed. 2d 528 (1995), dealt with the suit by a Florida corporation against one if its non-Florida franchisees in the Florida court system, claiming that the franchisee had breached the contract. In sustaining the finding of sufficient contacts in its ruling, the Court discussed the allegation that the defendant (despite no physical presence in Florida) had ". . . created continuing obligations between himself and residents of the forum state," permitting exercise of the jurisdiction of Florida courts over Mr. Rudzewicz. The decision emphasizes that it is not the making of a contract with an out-of-state party that alone automatically establishes sufficient minimum contacts but rather, the ". . . contemplated future consequences" of the relationship in evaluating whether a defendant has intentionally and purposefully established minimum contacts with the state

forum which would make it reasonable and foreseeable that he might be haled into the courts of the state.

CONCLUSION

The decisions of this Court, and intermediate appellate courts, have evolved to a consideration of whether due process is offended where out-of-state defendants are brought into the courts of a state where those defendants have targeted their intentions, with foreseeable results. The issue of whether purposeful targeting of the intangible, trade secrets created under the terms of a Tennessee contract would permit a suit in the courts of the state justifies the granting of the Petition for a Writ of Certiorari. It is important to more narrowly define the scope of the examination of earlier decisions which have evaluated the relationship between such remote conduct, and the well-established requirement for "purposeful availment."

Regardless of where a defendant is physically located, if that defendant knowingly and intentionally (but remotely) targets an asset or an individual in another state, the minimum due process requirements of "purposeful availment" and "reasonableness" should be met.

The Court's clarification of the application of the concept of minimum contacts to Intera's experience with the North Carolina Defendants will provide needed general guidance.

Respectfully submitted,

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Dated February 3, 2006

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-6081

[Filed November 10, 2005]

INTERA CORPORATION, et al., Plaintiffs- Appellants,	)
v.	)
GEORGE HENDERSON III, et al., Defendants-Appellees.	)

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 03-00755- Robert L. Echols, Chief District Judge.

JUDGES Before SILER and DAUGHTREY, Circuit Judges; MARBLEY, District Judge.*

* The Honorable Algenon L. Marbley, United States District Judge for the Southern District of Ohio, sitting by designation.

OPINION

ALGENON L. MARBLEY, District Judge. Plaintiffs-Appellants ("Plaintiffs") Intera Corporation and Intera Technologies (sometimes collectively referred to as "Intera") appeal the district court's dismissal of their lawsuit against Defendants-Appellees ("Defendants") George Henderson, III, John Englar, and Nano-Tex, Inc (hereinafter "Nano-Tex") for lack of personal jurisdiction with prejudice. Intera sued Henderson, Englar, and Nano-Tex for misappropriation of trade secrets, technology, and "know how," in violation of Tennessee's version of the Uniform Trade Secrets Act (codified as amended at TENN. CODE § 47-25-1701), in addition to raising claims of common law trade secret appropriation, breach of constructive trust, civil conspiracy, fraud, unjust enrichment, and tortious interference with business relations. The district court held that it lacked personal jurisdiction over Defendants, and thus, it dismissed the case. Jurisdiction is proper under 28 U.S.C. § 1291.[1] For the reasons set forth below, we **AFFIRM** the district court's decision that it lacked personal jurisdiction over Defendants, but **REVERSE** the district court's decision to dismiss Plaintiffs' action for lack of personal jurisdiction "with prejudice."

BACKGROUND

Plaintiffs are Tennessee corporations engaged in the industry of textile development and promotion. Their business

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[1] Defendants challenge this Court's jurisdiction to decide the merits of this appeal on the basis that Plaintiffs did not timely appeal the district court's dismissal of the case for lack of personal jurisdiction. *See infra* Part I.A.

includes the development of trade secrets, technology, and specialized "know how." Henderson and Englar are not residents of Tennessee, and Nano-Tex is not a Tennessee corporation.

In 1992, Intera and Burlington Knitted Fabrics, Inc. ("Burlington Fabrics"), a division of Burlington Industries, Inc. ("Burlington Industries") entered into a written license agreement. The following year, Intera and Burlington Woven, another division of Burlington Industries, entered into a license agreement, which provided for the confidential use and application of Intera's specialized fabric treatment processes. The license agreement between Intera and Burlington Woven contained a choice-of-law provision, which provided that all disputes arising under the agreement would be decided by Tennessee law, in a Tennessee forum. Additionally, Burlington Industries' employees with access to Intera's technology were required to provide "confidentiality assurances" to protect Intera's know how from disclosure to competitors and other unauthorized persons. At the time Intera entered into the license agreements, Henderson served as Burlington Industries' chief operating officer, and Englar served as Burlington Industries' vice president, and thus, they were required to keep their knowledge of Intera's technology confidential.

In the late 1990s, Intera invited Burlington Industries to enter into a joint venture for the purpose of further developing Intera's technology. This was consistent with the terms of the existing license agreement that Intera had entered into with Burlington Woven. Thereafter, Intera disclosed a confidential business plan to Burlington Industries. According to Intera, at some point in the late 1990s, Henderson and Englar colluded to adopt and to expand the technology that Intera had

confidentially licensed to Burlington Industries and its various divisions.

In August 2000, John Maier, Burlington Industries' intellectual property counsel, informed Intera that Burlington Industries was considering the use of similar technology from Nano-Tex, one of Intera's competitors. Paragraph 2.2 of the license agreement between Intera and Burlington Woven requires Burlington Industries to provide Intera with ninety days' written notice sent via certified mail if the company "ever developed any interest in adopting or utilizing similar technology from any other source. . . ." Henderson and Englar created Nano-Tex, and at some point post-creation, Burlington Industries became the majority shareholder and parent company of Nano-Tex. Henderson and Englar remained corporate officers of Burlington Industries while at the same time serving as principal officers and stockholders of Nano-Tex, thus providing them with the opportunity to divert Intera's customers to Nano-Tex. Intera tested Nano-Tex's fabric and discovered that the fabric exhibited many properties of Intera's technological innovations and know-how. Accordingly, Intera alleges that Nano-Tex developed a directly competitive textile application, in which it used Intera's technology to benefit Henderson, Englar, and others.

On August 21, 2002, Plaintiffs filed suit against Defendants alleging misappropriation of trade secrets, technology, and know how "related to the testing of moisture-absorbing and/or moisture-transporting fabrics" under Tennessee's version of the Uniform Trade Secrets Act. In their suit, Plaintiffs also alleged several other state law claims against the Defendants including the following: common law claims of trade secret appropriation, breach of constructive trust, civil conspiracy, fraud, unjust enrichment, and tortious interference with business relations. Defendants moved to

dismiss Plaintiffs' claims for lack of personal jurisdiction, pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure. Defendants claimed that dismissal for lack of personal jurisdiction was proper as it pertains to Henderson and Englar because they are residents of North Carolina, both work in that state, and they have no contacts with Tennessee. Furthermore, Defendants argued that dismissal of Plaintiffs' claims against Nano-Tex was warranted because Nano-Tex is a California limited liability company, which has its principal place of business in Greensboro, North Carolina, it transacts no business in Tennessee, and it has no other connections with Tennessee. Alternatively, Defendants moved for dismissal of Plaintiffs' common law claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the basis that Tennessee's version of the Uniform Trade Secret Act preempts Plaintiffs' common law claims.

The district court noted that the parties disputed the court's personal jurisdiction over Defendants, but exercised subject matter jurisdiction based on diversity of citizenship pursuant to 28 U.S.C. § 1332. *Intera Corp. v. Henderson*, No. 3:03-0755, slip op. at 6 (M.D. Tenn. May [illegible], 2004). With respect to Henderson and Englar, the district court held that: (1) Plaintiffs failed to make a prima facie showing that Henderson and Englar "personally availed themselves of the privilege of acting in Tennessee or causing a consequence in Tennessee"; (2) Plaintiffs did not adduce facts tending to show that Henderson and Englar engaged in activities in Tennessee; and (3) the consequences of Henderson's and Englar's "business operations" did not bear a substantial enough connection with Tennessee to make the exercise of jurisdiction over those defendants reasonable. *Id.* at 16-17. With regard to Nano-Tex, the district court held it lacked personal jurisdiction over the company because: (1) Plaintiffs did not allege facts intimating that Nano-Tex has any

"apparent" contacts with Tennessee; (2) Plaintiffs failed to establish that Nano-Tex is the alter-ego of Henderson and Englar such that the company has no personality separate from Henderson and Englar; (3) Plaintiffs failed to establish that Nano-Tex exercised any control over its parent company, Burlington Industries; and (4) Plaintiffs failed to establish that Nano-Tex and Burlington Industries are not separate entities. *Id.* at 19-21.

ANALYSIS

I. The Jurisdiction of this Court to Review the District Court's Dismissal of Plaintiffs' Case for Lack of Personal Jurisdiction

As a threshold matter, the Defendants challenge this Court's jurisdiction to review the district court's dismissal of the Plaintiffs' case for lack of personal jurisdiction on the grounds that Plaintiffs filed a defective FED. R. CIV. P. 59(e) motion, which did not toll the thirty-day period for filing a timely appeal.

A. The Effect of a Defective Rule 59 Motion on the Tolling of the Thirty-Day Period for Filing a Timely Appeal

Rule 4 of the Federal Rules of Appellate Procedure requires that, in a civil case, in which the United States is not a party, an appeal "as of right" must be filed with the district court clerk within thirty days after the judgment or order from which a party appeals is entered. FED. R. APP. P. 4(a)(1)(A). A party's compliance with the time strictures of Rule 4(a)(1)(A) is "mandatory and jurisdictional." *Peake v. First Nat'l Bank & Trust*, 717 F.2d 1016, 1018 (6th Cir. 1983) (citations omitted). Rule 4, however, also provides that a party's timely filed Rule 59 motion tolls the thirty-day time

period for filing a notice of appeal. FED. R. APP. P. 4(a)(4)(A)(iv). In order for a Rule 59 motion to be deemed "timely," the motion must be served "no later than 10 days after entry of the judgment."[2] FED. R. CIV. P. 59(e). The time for appeal does not begin to run again until the district court disposes of the Rule 59 motion. FED. R. APP. P. 4(a)(4)(A).

A party who files a Rule 59(e) motion must comply with the motions filing requirements set forth in FED. R. CIV. P. 7(b). Rule 7(b)(1) states in relevant part, "An application to the court for an order shall be made by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought."[3] FED. R. CIV. P. 7(b)(1). This Court previously has held that a Rule 59 motion is "inadequate," and consequently, does not toll the period for filing a timely appeal under two conditions: (1) when the moving party does not state the "grounds" for the motion as required by Rule 7(b), and (2) when a moving party fails to file his motion within the time frame as provided in Rule 59(e). *See Linsmeier v. Brown*, 156 F.3d 1230 (table), 1998 WL 476175, at *1 (6th Cir. 1998) (holding that a motion for reconsideration in which the movant fails to state the grounds

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[2] This Court has clarified that the 10-day time period for a Rule 59(e) motion corresponds to the date of service of the motion, and not the date that the motion is filed with the district court. *Peake v. First Nat'l Bank & Trust*, 717 F.2d 1016, 1019 (6th Cir. 1983) (citation omitted).

[3] Defendants do not dispute that Plaintiffs indicated the relief that they sought from the district court in the Rule 59(e) motion, which is to alter or amend the judgment to a dismissal for lack of personal jurisdiction *without prejudice*.

for the motion does not toll the appeal period where the movant's brief in support of such motion is not filed within the 10-day time period as mandated in FED. R. CIV. P. 59(e)); *Sammons v. Rotroff*, 779 F.2d 52 (table), 84-5485, 1985 WL 13827, at *1 (6th Cir. 1985) (holding that a one sentence motion was "inadequate" as a Rule 59(e) motion to alter or amend a judgment because it failed to state the grounds for the motion as required by FED. R. CIV. P. 7(b), and hence, the appeal period was not tolled).

This Court, however, has not yet considered Rule 7(b)(1)'s requirement that a motion "state with particularity the grounds therefor." In the absence of such Sixth Circuit authority, the parties rely on cases from other circuits for interpretation of the phrase.

In the Seventh Circuit, "particularity" has been interpreted to mean "reasonable specification." *Talano v. Northwestern Med. Faculty Found., Inc.*, 273 F.3d 757, 760 (7th Cir. 2001) (quoting *Martinez v. Trainor*, 556 F.2d 818, 819-20 (7th Cir. 1977)). In *Talano*, the court held that the plaintiff's Rule 59 motion lacked the specificity to toll the thirty-day appeal period because in his motion plaintiff sought reconsideration of the district court's dismissal of his action for "several reasons," yet failed to enumerate or otherwise identify the reasons or grounds for reconsideration.[4] *Id.* at

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[4] The plaintiff in *Talano v. Northwestern Med. Faculty Found., Inc.*, 273 F.3d 757 (7th Cir. 2001), indicated in his Rule 59(e) motion that he would fully address the "several reasons" as to why he sought reconsideration of the district court's dismissal of his Age Discrimination in Employment Act claims in a memorandum in support, which he sought leave of court to file at a later date. *Talano*, 273 F.3d at 760. Subsequently, and outside of the Rule 59(e) 10-day time period, the plaintiff submitted his memorandum

761. In *Martinez*, the court noted that "particularity" has been interpreted to mean "reasonable specification," but it held that because the defendant "failed to state even one ground" upon which the district court should grant its Rule 59(e) motion, the defendant did not satisfy the particularity requirement of Rule 7(b)(1). *Martinez*, 556 F.2d at 820.

In the Third Circuit, Rule 7(b)(1)'s requirement that a motion "state with particularity the grounds therefor," has been liberally construed. *See Harkins v. Ford Motor Co.*, 437 F.2d 276, 276 n.1 (3d Cir. 1970) (noting that as a general matter, courts have liberally interpreted Rule 7(b)(1)'s requirement that a motion "state with particularity the grounds therefor") (citations omitted). Additionally, courts in the Third Circuit have not exalted form over substance when interpreting Rule 7(b)(1)'s particularity requirement.[5] *See,*

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in support of his Rule 59(e) motion, which the district court accepted. *Id.* at 761. Yet, the *Talano* court held that a party would not be permitted to file a "skeleton" Rule 59(e) motion, and then later provide the requisite particularity after the 10-day period as provided in Rule 59 has expired. *Id.* (citing *Martinez v. Trainor*, 556 F.2d 818, 820 (7th Cir. 1977); *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Wis.*, 957 F.2d 515, 516-17 (7th Cir. 1992)).

[5] Plaintiffs also rely on *Lack Indus., Inc. v. Ralston Purina Co.*, 327 F.2d 266 (8th Cir. 1964) for the proposition that Rule 7(b)(1)'s requirement that a motion "state with particularity the grounds therefor," is a flexible and reasonable one, which does not elevate form over substance. Yet, Plaintiff's-Appellants' reliance on *Ralston Purina* is misplaced. In *Ralston Purina*, the court stated that a party's "grounds in its motion for a new trial must be 'reasonably specific'" in order to comply with the particularity requirement imposed by Rule 7(b)(1). *Id.* at 274. This appears to be in accordance with the Seventh Circuit's interpretation of the Rule

e.g., *Raughley v. Pa. Ry. Co.*, 230 F.2d 387, 391 (3d Cir. 1956) (holding that the "purpose" of Rule 7(b)(1) is "to give a simple and elastic procedure without too much emphasis on form").

Finally, the particularity requirement of Rule 7(b)(1) may be supplemented by local district court rules that require a party to file written motions with concomitant briefs that contain legal argument. 2-7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 7.03[4][c] (3d ed. 2005). In the case sub judice, the district court determined that Plaintiffs' Rule 59(e) motion was not accompanied by a memorandum of law. *Intera Corp. v. Henderson*, No. 3:03-[*613] 0755, at 1 (M.D. Tenn. July 29, 2004) (order denying Rule 59(e) motion to alter or amend). The memorandum of law requirement to which the district court referred is derived from Middle District of Tennessee Local Rule 8(b)(2), which states, in relevant part:

> Every motion that may require the resolution of an issue of law, in either civil or criminal cases, when filed shall be accompanied by a memorandum of law citing supporting authorities. . . . The memorandum submitted in support of a motion shall contain at the outset a short and concise statement of the factual and legal issues which justify the grant of the relief sought.

M.D. TENN. R. 8(b)(2).

7(b)(1) particularity requirement. *See Talano*, 273 F.3d at 760 (holding that the particularity requirement of Rule 7(b)(1) has been interpreted to mean "reasonable specification"). The *Ralston Purina* court, however, does not make any other statements that would lend support to Plaintiffs' proposition that Rule 7(b)(1)'s requirement is flexible, and that it elevates substance over form.

B. Whether Plaintiffs Filed a "Defective" Rule 59(e) Motion

Defendants claim that Plaintiffs' Rule 59(e) motion was "defective" because it did not comply with either Rule 59(e) or the district court's Local Rules; therefore, it did not toll the thirty-day appeal period. Specifically, Defendants assert that Plaintiffs failed to set forth grounds for their motion to alter or amend, and the motion was not accompanied by a memorandum of law. Thus, Defendants argue that because Plaintiffs' defective Rule 59(e) motion did not toll the appeal period, Plaintiffs did not file a timely appeal of the district court's decision, and consequently, this Court lacks jurisdiction to review the district court's dismissal of this case.

Plaintiffs respond that their Rule 59 motion met the requirements imposed by Rules 7(b)(1) and 59(e). Plaintiffs claim that their Rule 59(e) motion identifies Rule 41 of the Federal Rules of Civil Procedure as the grounds upon which the district court should alter or amend its judgment to dismiss their action for lack of personal jurisdiction to one "without prejudice."[6] Plaintiffs also contend that they need not cite "more exhaustive" legal authority in order for their Rule 59(e) motion to be effective; instead, a "concise citation" to Rule 41(b) as supporting legal authority is sufficient. Finally, Plaintiffs argue that they incorporated a memorandum of law in their Rule 59(e) motion, and that no particular format for the memorandum of law is required where the relief requested

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[6] Rule 41(b) provides in relevant part, "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction . . ., operates as an adjudication upon the merits." FED. R. CIV. P. 41(b).

is limited to the specific wording of the cited Rule of Civil Procedure.

This Court agrees that Plaintiffs' motion meets -- albeit barely -- the requirements of Rules 7(b)(1) and 59(e). First, consistent with general federal jurisprudence, Plaintiffs reasonably specified, though in a succinct manner, that one ground for the Rule 59(e) motion was to petition the district court to alter or amend its judgment to provide for dismissal without prejudice, as provided in FED. R. CIV. P. 41. Unlike the plaintiff in *Talano*, the Plaintiffs did not indicate that they were seeking relief for "several reasons" that would later be explicated in a memorandum in support of the motion to be filed with the court outside the 10-day time frame under Rule 59(e). *Talano*, 273 F.3d at 760-61. Second, liberally construing FED. R. CIV. P. 7(b)(1)'s particularity requirement as we must, we find that Plaintiffs' concise reference to Rule 41(b) as the legal basis for their Rule 59(e) satisfies the particularity requirement since Plaintiffs identified a specific ground for the motion. *See Harkins,* 437 F.2d 276.

Finally, under Local Rule 8(b)(2) of the Middle District of Tennessee, a moving party is required to submit a memorandum in support of a Rule 59(e) motion, that must "contain at the outset a short and concise statement of the factual and legal issues which justify the grant of the relief sought." M.D. TENN. R. 8(b)(2). The memorandum must also contain citations to "supporting authorities." *Id.* In this case, Plaintiffs did not submit a document designated as a "memorandum of law," but they included a brief statement of the procedural posture of the case and cited Rule 41 for legal support that a dismissal for lack of personal jurisdiction should be made "without prejudice." Nothing in the plain wording of Local Rule 8(b)(2) expressly states or intimates that a "memorandum of law" must be designated as such.

Where, as in the present action, a party moves a court for relief and includes a "short and concise" statement of the issues justifying the grant of relief sought, in addition to citing "supporting authorities," he satisfies the "memorandum of law" requirement of Local Rule 8(b)(2).

Accordingly, Plaintiffs did not file a defective Rule 59(e) motion, the thirty-day appeal period was tolled, and the Court has jurisdiction to review Plaintiffs' appeal of the district court's dismissal of their action.

II. Whether the District Court Erred in Dismissing Plaintiffs' Case for Lack of Personal Jurisdiction

A. Standard of Review

We review a district court's dismissal for lack of personal jurisdiction *de novo*. *Calphalon Corp. v. Rowlette*, 228 F.3d 718, 721 (6th Cir. 2000). If the district court, as in the instant action, did not conduct an evidentiary hearing, we must review the pleadings and affidavits in the light most favorable to Plaintiffs, without considering the "controverting" assertions of the Defendants.[7] *Id.*

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[7] In their opening brief, Plaintiffs assert that the district court should have permitted discovery in order to "ascertain" the facts surrounding their relationship with Defendants. Specifically, Plaintiffs argue that discovery should be conducted so that they may determine whether the references to corporate employees and officers, and their confidentiality duties in the license agreement between Intera and Burlington Industries extends to tort actions in Tennessee against employees of the parties to the contract.

If the district court rules on a FED. R. CIV. P. 12(b)(2) motion before trial, as in this case, it has the discretion to adopt any of the

B. Dismissal for Lack of Personal Jurisdiction

As a threshold matter, Plaintiffs do not challenge the determinations the district court made with respect to its lack of personal jurisdiction over Nano-Tex. The district court held that it lacked personal jurisdiction over Nano-Tex because Plaintiffs: (1) did not allege facts intimating that Nano-Tex has any "apparent" contacts with Tennessee; (2) failed to establish that Nano-Tex is the alter-ego of Henderson and Englar such that the company has no personality separate from Henderson and Englar; (3) failed to establish that Nano-Tex exercised any control over its parent company, Burlington Industries; and (4) provided no evidence that Nano-Tex and Burlington Industries are not separate entities. *Intera Corp. v. Henderson*, No. 3:03-0755, slip op. at 19-21 (M.D. Tenn. May 26, 2004). Because Plaintiffs failed to raise any issues as to the district court's jurisdictional findings regarding Nano-Tex, they have abandoned the issue of whether the district court had personal jurisdiction over the

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following courses of action: (1) determine the motions based on affidavits alone; (2) permit discovery, which would aid in resolution of the motion; or (3) conduct an evidentiary hearing on the merits of the motion. *Serras v. First Tenn. Bank Nat'l Ass'n.*, 875 F.2d 1212, 1214 (6th Cir. 1989). The district court in the present action neither permitted discovery nor held an evidentiary hearing. Instead, it decided the Rule 12(b)(2) motion on the pleadings, affidavits, and "other evidence" before it. *Intera Corp. v. Henderson*, No. 3:03-0755, slip op. at 9 (M.D. Tenn. May 26, 2004). Plaintiffs do not argue that the district court abused its discretion by relying on the pleadings, affidavits, and "other evidence" as opposed to allowing the parties to conduct discovery. Therefore, Plaintiffs' argument that the district court should have permitted discovery before ruling on the Rule 12(b)(2) motion lacks merit.

company. *Sommer v. Davis*, 317 F.3d 686, 691 (6th Cir. 2003) (holding that an issue is abandoned if a party does not present any argument respecting the issue in his brief).

1. "General" v. "Specific" Personal Jurisdiction

The plaintiff bears the burden of making a prima facie showing of the court's personal jurisdiction over the defendant. *Id.*; *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir. 1991). Personal jurisdiction may be either "general" or "specific." *Bird v. Parsons*, 289 F.3d 865, 873 (6th Cir. 2002). General jurisdiction exists when a defendant's "contacts with the forum state are of such a continuous and systematic nature that the state may exercise personal jurisdiction over the defendant even if the action is unrelated to the defendant's contacts with the state." *Id.* (citing *Third Nat'l Bank in Nashville v. WEDGE Group, Inc.*, 882 F.2d 1087, 1089 (6th Cir. 1989)). In the present action, the district court held that although Plaintiffs have not conceded that the court lacks general jurisdiction over Defendants, they predicated their prima facie case of personal jurisdiction on specific jurisdiction. *Intera Corp.*, No. 3:03-0755, at 10. Plaintiffs do not challenge this finding on appeal. Therefore, we limit our personal jurisdiction analysis to a discussion of specific jurisdiction.

An exercise of specific jurisdiction is proper where the claims in the case arise from or are related to the defendant's contacts with the forum state. *Kerry Steel, Inc. v. Paragon Indus., Inc.*, 106 F.3d 147, 149 (6th Cir. 1997). In *Southern Machine Company v. Mohasco Industries, Inc.*, we promulgated a three-prong test that not only guides the determination of whether specific jurisdiction exists, but also protects the due process rights of a defendant. *S. Mach. Co.*

v. Mohasco Indus., Inc., 401 F.2d 374, 381 (6th Cir. 1968). The *Southern Machine* test provides:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Id.

2. Tennessee's Long-Arm Statute

In a diversity action, the law of the forum state dictates whether personal jurisdiction exists, subject to constitutional limitations. *Calphalon Corp.*, 228 F.3d at 721; *Reynolds v. Int'l Amateur Athletic Fed'n*, 23 F.3d 1110, 1115 (6th Cir. 1994). A court's exercise of personal jurisdiction over a nonresident defendant is appropriate only if it meets the state's long-arm statute and constitutional due process requirements. *Calphalon Corp.*, 228 F.3d at 721. Furthermore, the Court's exercise of jurisdiction comports with due process when the defendant has sufficient minimal contacts such that "'traditional notions of fair play and substantial justice' are not offended." *Neal v. Janssen*, 270 F.3d 328, 331 (6th Cir. 2001) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)). In the case sub judice, the Tennessee long-arm statute provides the relevant governing state statute, which assists a court in determining whether any action or claim for relief arises from a nonresident defendant's conduct within the state. Tennessee's long-arm statute pertains to: "the

transaction of any business within the state"; "any tortious act or omission within this state"; "the ownership or possession of any interest in property located within this state"; or "entering into a contract for services to be rendered or for materials to be furnished in this state." TENN. CODE § 20-2-214(a)(1), (2), (3), and (5). Section 20-2-214(c) also permits the exercise of personal jurisdiction over a defendant when he undertakes any of the above actions through an "agent or personal representative." TENN. CODE § 20-2-214(c).

Tennessee's long-arm statute has been interpreted to be "coterminous with the limits on personal jurisdiction imposed" by the Due Process Clause of the United States Constitution, and thus, "the jurisdictional limits of Tennessee law and of federal constitutional law of due process are identical." *Payne v. Motorists' Mut. Ins. Cos.*, 4 F.3d 452, 455 (6th Cir. 1993). *See also Aristech Chem. Int'l v. Acrylic Fabricators*, 138 F.3d 624, 627 (6th Cir. 1998) ("When a state's long-arm statute reaches as far as the limits of the Due Process Clause, the two inquiries merge and the court 'need only determine whether the assertion of personal jurisdiction . . . violates constitutional due process.'" (quoting *Nationwide Mut. Ins. Co. v. Tryg Int'l Ins. Co.*, 91 F.3d 790, 793 (6th Cir. 1996)).

3. Purposeful Availment

This Court views the purposeful availment prong of the *Southern Machine* test as "essential" to a finding of personal jurisdiction. *Calphalon Corp.*, 228 F.3d at 722 (citing *LAK, Inc. v. Deer Creek Enters.*, 885 F.2d 1293, 1300 (6th Cir. 1989)). The purposeful availment requirement serves to protect a defendant from being haled into a jurisdiction by virtue of "random," "fortuitous," or "attenuated" contacts.

Id. (citations omitted). We have held previously that purposeful availment may exist when a defendant makes telephone calls and sends facsimiles into the forum state and such communications "form the bases for the action." *Neal*, 270 F.3d at 332. In a similar vein, we have held that the "actual content" of the communications into the forum state that give rise to an intentional tort action may constitute purposeful availment. *Id.*

Finally, because of Henderson's and Englar's status as corporate officers of Burlington Industries and Nano-Tex, it is essential to note that "where an out-of-state agent is actively and personally involved in the conduct giving rise to the claim, the exercise of personal jurisdiction should depend on traditional notions of fair play and substantial justice; *i.e.*, whether [the agent] purposely availed [himself] of the forum and the reasonably foreseeable consequences of that availment." *Balance Dynamics Corp. v. Schmitt Indus., Inc.*, 204 F.3d 683, 698 (6th Cir. 2000) (citations omitted).

Plaintiffs concede that Defendants Henderson and Englar are not residents of Tennessee. They also admit that Henderson and Englar did not engage in any of the alleged deceptive actions within Tennessee. Additionally, Plaintiffs do not allege facts suggesting that Henderson and Englar have transacted business in Tennessee in their personal or official capacities as corporate officers, or that Henderson and Englar own or possess interests in property located within the state.

Instead, Plaintiffs argue that Henderson and Englar have purposely availed themselves of the forum state because (1) they used the license agreement between Intera and Burlington Woven as the vehicle through which they obtained Intera's "know how," which (2) they in turn appropriated to their use and benefit, and (3) they knew the license agreement provides

for a Tennessee jurisdictional forum for disputes arising from the agreement and it requires Burlington Industries' employees who have access to Intera's "know how" and technology to keep the information confidential. Plaintiffs, however, do not explain why Henderson's and Englar's knowledge of the choice-of-law provision in the license agreement between Intera and Burlington Woven demonstrates that they deliberately affiliated themselves with Tennessee, or that Henderson and Englar could reasonably expect to become embroiled in possible litigation in Tennessee. *See Calphalon Corp.*, 228 F.3d at 723 (stating that "even though [the defendant] was on notice that the contract was to be governed by Ohio law, it did not make deliberate affiliation with that state nor could it reasonably foresee possible litigation there"). We reached this conclusion in *Calphalon* notwithstanding the fact that the defendant in that case was an actual party to the contract in dispute. *Id.* at 720. In the present action, neither Henderson nor Englar was a party to the license agreement between Intera and Burlington Woven.

Moreover, while Plaintiffs argue that Henderson and Englar purposefully availed themselves of the forum state by engaging in fraudulent or conspiratorial conduct outside of Tennessee, which would have reasonably foreseeable consequences in the state, we decline to decide this argument because it was not presented to the district court. *See Elkins v. Richardson-Merrell, Inc.*, 8 F.3d 1068, 1072 (6th Cir. 1993) (holding that "this court does not normally address issues raised for the first time on appeal") (internal quotation marks and citations omitted).

Plaintiffs also proffer letter correspondence between James E. Klopman, Intera Corporation's Vice President of Marketing, and Defendant Henderson, in which Henderson

expressed his gratitude to Klopman for sending a knit shirt to him. Yet, Henderson did not send the letter to or from Tennessee. Finally, Plaintiffs do not allege that Henderson and Englar made telephone calls, or sent facsimiles to Tennessee which "form the bases" for the action pending before this Court. *Neal*, 270 F.3d at 332.

Based upon the foregoing, we hold that the district court did not err when it concluded that Defendants Henderson and Englar did not purposefully avail themselves of the privilege of acting in Tennessee.

4. Arising From

We have held that the "arising from" prong of the *Southern Machine* test is satisfied "when the operative facts of the controversy arise from the defendant's contacts with the state." *Calphalon*, 228 F.3d at 723. Furthermore, in analyzing the second prong of the *Southern Machine* test, this Court has previously held that "physical presence is not the touchstone of personal jurisdiction," and hence, personal jurisdiction may exist over a defendant although he is not physically present in the forum if he "purposefully directs communications into the forum, and those communications form the 'heart' of the cause of action." *Neal*, 270 F.3d at 333.

In this case, Plaintiffs have presented no facts suggesting that Defendants Henderson and Englar have had contact with Tennessee either in a personal or an official capacity as corporate officers. Even accepting as true Plaintiffs' contention that the implementation of the license agreement between Intera and Burlington Woven required Burlington Industries' officers and representatives to have "substantial and regular" contact with Intera, Plaintiffs do not assert facts

tending to show that Henderson and Englar had such contact with Intera in Tennessee.

Thus, the district court did not err when it concluded that Plaintiffs have not satisfied prong two, the "arising from" requirement of the *Southern Machine* test.

5. Reasonableness

If prongs one and two of *Southern Machine* test are satisfied, then there is an inference that the reasonableness prong is satisfied as well. *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1268 (6th Cir. 1996) (citing *Am. Greetings Corp. v. Cohn*, 839 F.2d 1164, 1170 (6th Cir. 1988)). Because we find that Plaintiffs have failed to satisfy the "purposeful availment" and "arising from" requirements of the *Southern Machine* test, an inference of reasonableness is not warranted in this case.

The third prong of the *Southern Machine* test mandates that "the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable." *See Youn v. Track, Inc.*, 324 F.3d 409, 419 (6th Cir. 2003) (citation omitted). Generally, when considering whether it is reasonable to exercise personal jurisdiction over a non-resident defendant, a court must consider several factors including the following: (1) the burden on the defendant; (2) the interest of the forum state; (3) the plaintiff's interest in obtaining relief; and (4) other states' interest in securing the most efficient resolution of the controversy. *Patterson*, 89 F.3d at 1268. First, Defendants Henderson and Englar would be substantially burdened if they were compelled to litigate this case in Tennessee given the fact that neither defendant resides in the state. Yet, we have

deemed specific jurisdiction to be proper even when a defendant would be compelled to travel. *See Youn*, 324 F.3d at 420 (citing *Lanier v. Am. Bd. of Endodontics*, 843 F.2d 901, 911-12 (6th Cir. 1988) (permitting personal jurisdiction in Michigan over Illinois defendant); *Cohn*, 839 F.2d at 1170-71 (upholding personal jurisdiction in Ohio over California defendant)).

Second, Tennessee would have a strong interest in exercising jurisdiction over Henderson and Englar because Plaintiffs are resident corporations of the state of Tennessee, which would have an interest in "protecting its residents' legal options." *Youn*, 324 F.3d at 419. Nevertheless, Plaintiffs' concession that Defendants Henderson and Englar did not commit their alleged deceptive acts within the geographical confines of Tennessee appears to diminish the state's purported strong interest. Furthermore, the choice-of-law provision of the license agreement between Intera and Burlington Woven which provides that all disputes arising under the agreement would be decided by Tennessee law, in a Tennessee forum, does not confer an interest upon Tennessee in this case. The existence of a choice-of-law provision, standing alone, is insufficient to establish jurisdiction, but such a provision may "reinforce [a] deliberate affiliation with the forum State and the reasonable foreseeability of possible litigation there." *Calphalon Corp.*, 228 F.3d at 723 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 482, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)). In the present action, Defendants were not parties to the Intera-Burlington Woven license agreement, and consequently, neither defendant could have reasonably expected to be haled into a Tennessee court.

Third, Plaintiffs have a substantial interest in obtaining relief. Fourth, given the fact that Defendants claim to be

residents of North Carolina where they were employed as corporate officers of Burlington Industries and Nano-Tex, and Plaintiffs admit that Henderson and Englar did not engage in fraudulent acts within the state of Tennessee, it appears that the state of North Carolina may have a strong interest in resolving this controversy.

For the foregoing reasons, we conclude that it would not be reasonable for a Tennessee court to exercise personal jurisdiction over Defendants Henderson and Englar because Henderson and Englar do not have a substantial enough connection with the forum state. Because we hold that Plaintiffs have failed to establish all three prongs of the *Southern Machine* test for specific jurisdiction, we **AFFIRM** the district court's dismissal of Plaintiffs' action for lack of personal jurisdiction.

III. Whether Appellants Abandoned Their Appeal of the District Court's Denial of the FED. R. CIV. P. 59(e) Motion

Defendants argue that Plaintiffs have abandoned their appeal from the district court's denial of their Rule 59(e) motion because Plaintiffs did not present arguments concerning the district court's denial of the motion in their opening brief. Plaintiffs respond that they have not abandoned their Rule 59(e) appeal because in their opening brief, they addressed the district court's error in denying the Rule 59(e) motion.

Contrary to Defendants' assertion, Plaintiffs have not abandoned their appeal of the district court's denial of their Rule 59(e) motion. As set forth above, a party's failure to present argument on a particular issue that he has appealed will constitute abandonment. *See Sommer v. Davis*, 317 F.3d

686, 691 (6th Cir. 2003) (holding that an issue is abandoned if a party does not present any argument respecting the issue in his brief); *see also Preferred Automotive Sales Inc. v. Kocis*, 60 Fed. Appx. 583, 2003 WL 1795800, at *1 (6th Cir. Apr. 1, 2003) (holding that the defendant "abandoned his appeal by failing to brief the germane issue: whether the district court erred in denying his motion for reconsideration"). In their opening brief, Plaintiffs assert that the district court's dismissal of their case for lack of personal jurisdiction should have been without prejudice, consistent with the provisions of FED. R. CIV. P. 41(b). While Plaintiffs did not state expressly that the district court "erred in denying their Rule 59(e) motion," they raised an identical "dismissal without prejudice" argument in their Rule 59(e) motion that they filed with the district court.

Accordingly, Plaintiffs have not abandoned their Rule 59(e) appeal, and the Court now turns to the final issue of whether the district court erred in denying Plaintiffs' Rule 59(e) motion.

IV. Whether the District Court Erred When it Denied Plaintiffs' FED. R. CIV. P. 59(e) Motion

A. Standard of Review

Generally, we review a denial of a Rule 59(e) motion to alter or amend a judgment for abuse of discretion. *Morales v. Am. Honda Motor Co.*, 151 F.3d 500, 518 (6th Cir. 1998). "A district court abuses its discretion when it relies on clearly erroneous findings of fact, or when it improperly applies the law or uses an[] erroneous legal standard." *Romstadt v. Allstate Ins. Co.*, 59 F.3d 608, 615 (6th Cir. 1995) (internal quotation marks and citations omitted).

B. The District Court's Order Denying Plaintiffs' Motion

In Plaintiffs' Rule 59(e) motion, they petitioned the district court to alter or amend its judgment by designating dismissal for lack of personal jurisdiction to be "without prejudice," in accordance with FED. R. CIV. P. 41.[8] In denying the Plaintiffs' Rule 59(e) motion, the district court held that their motion: (1) did not set forth any grounds for their request; (2) was not accompanied by a memorandum of law; (3) made no showing of any legal error, newly discovered evidence, change in law, or manifest injustice; and (4) provided no basis for amending its dismissal of Plaintiffs' claims with prejudice.[9] *Intera Corp. v. Henderson*, No. 3:03-0755, at 1 (M.D. Tenn. July 29, 2004 (order denying Rule 59(e) motion to alter or amend).

A court may grant a Rule 59(e) motion to alter or amend if there is: (1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice. *GenCorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999) citations omitted). It is apparent that Plaintiffs did not predicate their Rule 59(e) motion on the grounds of newly

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[8] In the alternative, Plaintiffs requested that the district court transfer the case to the state of North Carolina pursuant to 28 U.S.C. § 1406(a). On appeal, however, Plaintiffs do not argue that the district court erred when it denied their transfer request. Thus, this issue is deemed abandoned. *Sommer*, 317 F.3d at 691.

[9] *See supra* Part I.B. for a discussion of the Court's findings with respect to whether Plaintiffs set forth the grounds for their Rule 59(e) motion, and whether they submitted a "memorandum of law" as prescribed by Local Rule b)(2) of the Middle District of Tennessee.

discovered evidence or an intervening change in controlling law. It is not evident, however, whether Plaintiffs premise their motion on the district court's clear error of law or whether they contend that the judgment should be altered or amended to prevent manifest injustice. Based upon a plain reading of FED. R. CIV. P. 41(b), and the facts of this case, we hold that the district court clearly erred when it dismissed Plaintiffs' action for lack of personal jurisdiction "with prejudice." Our reasons in support of this conclusion are two-fold. First, our conclusion is entirely consistent with the language of Rule 41(b), which provides in relevant part, "Unless the court in its order for dismissal otherwise specifies, *a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction . . ., operates as an adjudication upon the merits.*" FED. R. CIV. P. 41(b) (emphasis added). Thus, under Rule 41(b), dismissals for lack of personal jurisdiction should be made "without prejudice."

Second, in declaring that a dismissal for lack of jurisdiction does not "operate[] as an adjudication upon the merits," Rule 41(b) does not distinguish between subject matter and personal jurisdiction. FED. R. CIV. P. 41(b). Within the subject matter jurisdiction context, we have interpreted Rule 41(b) to mean that "a dismissal for lack of subject matter jurisdiction does not operate as an adjudication on the merits for preclusive purposes." *See Pratt v. Ventas, Inc.*, 365 F.3d 514, 522 (6th Cir. 2004) (citing *Holloway v. Brush*, 220 F.3d 767, 778 (6th Cir. 2000) (citing FED. R. CIV. P. 41(b))). This Court has explained the rationale underlying this rule:

> Merely because one court does not have jurisdiction over a dispute does not necessarily mean that another court is precluded from properly exercising

> jurisdiction over the matter. Moreover, if a court does not have jurisdiction over a matter, it cannot properly reach the merits of the case.

Id. (quoting *Wilkins v. Jakeway*, 183 F.3d 528, 533 n.6 (6th Cir. 1999)).

By logical extension, our rationale in *Pratt* applies with equal force to the personal jurisdiction context. Although Tennessee courts lack personal jurisdiction over Defendants Henderson and Englar, this does not lead to the inexorable conclusion that no court has personal jurisdiction over these defendants. Furthermore, upon a determination that personal jurisdiction is lacking, a court should not dismiss a case on the merits, especially when it appears that another court with appropriate jurisdiction may resolve the issues between the parties. In this case, because Henderson and Englar are residents of North Carolina, and many, if not all, of the alleged deceptive actions may have occurred in that state, the courts of North Carolina may be able to address Plaintiffs' claims against Defendants.

Finally, in reaching our holding, we do not place our imprimatur on vague or ambiguously worded petitions for Rule 59(e) relief. Moving parties are exhorted to state with clarity the basis for their Rule 59(e) motions. Nevertheless, under the facts of this case and in light of our discussion of the meaning of Rule 41(b), the requested relief is appropriate.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's dismissal of Plaintiffs' case for lack of personal jurisdiction, and we **REVERSE** the district court's "with

prejudice" dismissal and **REMAND** for a judgment entry of case dismissal "without prejudice."

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:03-0755

[Filed May 26, 2004]

INTERA CORPORATION, and INTERA TECHNOLOGIES, INC., Plaintiffs,	)
v.	)
GEORGE HENDERSON, III, JOHN ENGLAR, and NANO-TEX, INC. a/k/a NANO-TEX, LLC, Defendants.	)

ORDER

Presently pending before the Court is Defendants' Motion to Dismiss for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2), or in the alternative to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) (Docket Entry No. 8). For the reasons explained in the Memorandum entered contemporaneously

herewith, Defendants' Motion to Dismiss for lack of personal jurisdiction is GRANTED.

Therefore, this case is DISMISSED WITH PREJUDICE.

It is so ORDERED.

/s/_____
Robert L. Echols
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:03-0755

[Filed May 26, 2004]

INTERA CORPORATION, and INTERA TECHNOLOGIES, INC., Plaintiffs,	)
v.	)
GEORGE HENDERSON, III, JOHN ENGLAR, and NANO-TEX, INC. a/k/a NAN0-TEX, LLC, Defendants.	)

MEMORANDUM

Presently pending before the Court is Defendants' Motion to Dismiss for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2), or in the alternative to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12 (b)(6) (Docket Entry No. 8).

I.BACKGROUND

On August 21, 2002, Plaintiffs Intera Corporation and Intera Technologies, Inc. filed this action against Defendants George Henderson, III, John Englar, and Nano-Tex, Inc. Plaintiffs assert causes of action arising from the alleged misappropriation of their trade secrets, technology, and know-how related to the testing of moisture-absorbing and/or moisture-transporting fabrics under the Uniform Trade Secrets Act ("UTSA"), Tenn. Code Ann. § 47-25-1701. Plaintiffs allege also that Defendants are liable for common law claims of trade secret appropriation, breach of constructive trust, civil conspiracy, fraud, unjust enrichment, and tortious interference with business relations. Plaintiffs seek a permanent injunction, unspecified compensatory and exemplary damages, and any other relief to which they may be entitled.

Plaintiffs are Tennessee corporations engaged in the industry of textile developing and promoting. They offer their customers technologically advanced fabric treatments and applications. Plaintiffs' business includes the development of trade secrets, technology, and specialized know-how. In 1992, Plaintiffs entered into a written license agreement with Burlington Knitted Fabrics, Inc. ("Burlington Fabrics"), a division of Burlington industries, Inc. ("Burlington Industries"). In 1993, Plaintiffs entered into a license agreement with Burlington Woven, another division of Burlington Industries, regarding the confidential use and application of Plaintiffs' unique fabric treatment processes. At the time of these license agreements, Defendant Henderson was Burlington Industries' chief operating officer, and Defendant Englar was Burlington Industries' vice president.

In the late 1990's, Plaintiffs proposed to Burlington Industries that they enter into a joint venture to develop further Plaintiffs' technology, consistent with the terms of the existing license agreements with Burlington Woven. Plaintiffs disclosed their overall confidential business plan to Burlington Industries. Plaintiffs allege that at some point in the late 1990's, Henderson and Englar began secretly working to adopt and expand the technology that had been confidentially licensed to them by Plaintiffs. Plaintiffs contend that Henderson and Englar's work involved "the improving of chemical and/or physical properties of substrates" in violation of paragraph 2.2 of the license agreement with Burlington Woven. Plaintiffs allege that their technology was used to develop a competing process of fabric treatment. Further, they contend that Defendants' actions were in conflict with the specific disclosure requirements of the license agreement with Burlington Woven, which required confidentiality with regard to Plaintiffs' technology and required Burlington Industries' personnel to inform Plaintiffs if their technology was used in any way not described in the license agreements.

Plaintiffs were unaware of Defendants' activities until August 2000, when John Maier, intellectual property counsel for Burlington Industries, notified Plaintiffs that Burlington Industries was exploring the use of similar technology from Nano-Tex, one of its competitors.

Plaintiffs allege that Henderson and Englar created Nano-Tex shortly after they took possession of Plaintiffs' technology. Burlington Industries apparently became the majority shareholder and parent of Nano-Tex at some point after Henderson and Englar founded Nano-Tex. Burlington Industries retained Henderson and Englar as executives. According to Plaintiffs, Nano-Tex commenced a directly competitive textile application using Plaintiffs' technology for

the benefit of Henderson, Englar, and others. Plaintiffs allege that Henderson and others at Nano-Tex repeatedly blocked and delayed efforts by Plaintiffs to conduct an inquiry into Nano-Tex's technology to determine whether Plaintiffs' trade secrets and know-how were misappropriated until Burlington Industries filed Chapter ii bankruptcy proceedings.[1]

Burlington Industries maintains that this new technology was independently developed by an associate of Defendants, John Soane. However, Plaintiffs claim that Soane did not independently develop the technology because he had only minimal experience working with textiles and no experience working with the liquid solutions in which textiles are processed. Plaintiffs allege that any expertise in this field was based on the technological know-how they developed, to which Burlington Industries' executives had access. Further, Soane's purported development of this independent technology, exploited by Nano-Tex, took place at the same location that Burlington Industries' personnel had implemented Plaintiffs' technology under the terms of the license agreements and utilized the same personnel who were trained in the application of Plaintiffs' technology. Plaintiffs assert they were never notified of any of these activities, which they claim were in violation of paragraph 2.2 of the license agreement with Burlington Woven.

Plaintiffs allege that from some time in the late 1990's until the present, Henderson and Englar, while acting in their corporate roles as both Burlington Industries and Nano-Tex executives, attempted to persuade Burlington Industries'

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[1] It is unclear from the record exactly when Burlington Industries filed for bankruptcy protection, but it occurred sometime after Plaintiffs learned of the alleged misappropriation.

customers to switch from Plaintiffs' fabrics to Nano-Tex fabrics.[2] As a result of Defendants' misappropriation of trade secrets and know-how, and interference with business relations between Plaintiffs and Burlington Industries, Plaintiffs allege they have suffered monetary damages.

Plaintiffs have filed a proof of claim as a potential creditor in the Burlington Industries Chapter 11 proceeding, but only for a breach of contract claim against Burlington Industries for failure to safeguard Plaintiffs' confidential information. Plaintiffs did not file a proof of claim for misappropriation of trade secrets or other torts, as Plaintiffs believe that Burlington Industries did not commit any theft. Based on Plaintiffs' laboratory analysis of Nano-Tex fabric, Plaintiffs are convinced that Henderson and Englar, not Burlington Industries, are responsible for misappropriating Plaintiffs' technological know-how, which is the subject of the license agreement with Burlington Woven.[3] Accordingly, Plaintiffs did not name Burlington Industries, Burlington Fabrics, or Burlington Woven as Defendants in this action. Plaintiffs filed their Complaint against Henderson, Englar and Nano-Tex in this Court because Plaintiffs are incorporated in Tennessee, and the terms of the license agreements between Plaintiffs, Burlington Woven, and Burlington Fabrics provide that any legal disputes shall be litigated in Tennessee.

Defendants now move to dismiss Plaintiffs' claims for lack of personal jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(2). They assert that Defendants Henderson

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[2] Plaintiffs do not know exactly when their trade secrets were allegedly misappropriated.

[3] The license agreement with Burlington Fabrics was terminated in July 1996 when Burlington Fabrics closed.

and Englar are residents of North Carolina, work in North Carolina, and have no contacts with Tennessee.[4] They further aver that Defendant Nano-Tex is a California limited liability company with its principal place of business in Greensboro, North Carolina, does no business in Tennessee, and otherwise has no connection with Tennessee. Defendants assert that Plaintiffs cannot establish either general or specific personal jurisdiction over them. In the alternative, Defendants move to dismiss Plaintiffs' common law claims for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). They argue further that the common law claims are preempted by the Uniform Trade Secrets Act claim.

Although the personal jurisdiction of this Court over Defendants is in dispute, the Complaint alleges that this Court has subject matter jurisdiction based on diversity of citizenship. *See* 28 U.S.C.§ 1332 (1994 & Supp. V). Because the Court is sitting in diversity, it applies Tennessee substantive law. *See Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); 28 U.S.C. § 1652 (1994).

II. LEGAL STANDARD

"The logical priority of jurisdictional considerations" requires the Court to address the jurisdictional issue first. *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1158 (5th Cir. 1983).

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[4] Henderson passed through Chattanooga, Tennessee, once in the past five years while on business unrelated to Plaintiffs' claims. This contact is too random and attenuated to serve as the basis for jurisdiction. *See Burger King v. Rudzewicz*, 471 U.S. 462, 475 (1985); discussion *infra* at 12.

A. Procedural Posture Under Rule 12(b)(2)

A court should dismiss an action if it lacks personal jurisdiction over the defendant: Fed. R. Cir. P. 12(b)(2). The plaintiff bears the burden of showing that jurisdiction exists. *See Int'l Techs. Consultants, Inc. v. Euroglas, S.A.*, 107 F.3d 386, 391 (6th Cir. 1997)(citation omitted). A court confronted with a motion to dismiss for lack of jurisdiction must choose from three options: "it may decide the motion upon the affidavits alone; it may permit discovery in aid of deciding the motion; or it may conduct an evidentiary hearing to resolve any apparent factual questions." *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir. 1991). Which method to select lies in the trial court's discretion. *Mich. Nat'l Bank v. Quality Dinette, Inc.*, 888 F.2d 462, 466 (6th Cir. 1989). When foregoing an evidentiary hearing and relying solely on parties' submissions to decide a Rule 12 (b)(2) motion, the court must review the evidence in the light most favorable to the plaintiff, *see Nationwide Mut. Ins. Co. v. Trvq Int'l Ins. Co., Ltd.*, 91 F.3d 790, 793 (6th Cir. 1996), and the plaintiff need make only a prima facie showing of jurisdiction to defeat a motion to dismiss, *see Compuserve, Inc. v. Patterson*, 89 F. 3d 1257, 1262 (6th Cir. 1996) (citation omitted). The Plaintiff's burden is "relatively slight." *Am. Greetings Corp. v. Cohn*, 839 F.2d 1164, 1169 (6th Cir. 1988).

A "court disposing of a 12(b)(2) motion does not weigh the controverting assertions of the party seeking dismissal," since to do otherwise would allow non-resident defendants to "regularly avoid[] personal jurisdiction simply by filing an affidavit denying all jurisdictional facts . . . ." *Theunissen*, 935 F.2d at 1459; *see also Aristech Chem. Int'l, Ltd. v. Acrylic Fabricators, Ltd.*, 138 F.3d 624, 626 (6th Cir. 1998); *Mich. Nat'l Bank*, 888 F.2d at 466: (because district court eschewed evidentiary hearing, "it was obligated to look solely

to the plaintiff's pleadings and affidavits . . . [and] ignore contrary assertions by the [defendant] "). Dismissal "is only appropriate if all the specific facts which the plaintiff . . . alleges collectively fail to state a prima facie case for jurisdiction." *Compuserve*, 89 F.3d at 1262 (citation omitted). A Court may consider deposition testimony and affidavits offered by plaintiffs in support of their prima facie case for jurisdiction. *O'Hare Int'l Bank v. Hampton*, 437 F.2d 1173, 1176 (7th Cir. 1971); *see Pinker v. Roche Holdings, Ltd.*, 292 F.3d 361, 368 (3d Cir. 2002) ("[I]n reviewing a motion to dismiss under Rule 12 (b)(2), we must accept all of the plaintiff's allegations as true and construe disputed facts in favor of the plaintiff"); *Weidner Communications, Inc. v. H.R.H. Prince Bandar Al Faisal*, 859 F.2d 1302, 1306 n.7 (7th Cir. 1988) (citation omitted)("[T]he party asserting jurisdiction is entitled to the resolution in its favor of all disputes concerning relevant facts presented in the record.")

In the instant case, exercising its discretion, the Court has chosen to resolve the jurisdictional issues on the basis of the pleadings, affidavits, and other evidence before it and to forego an evidentiary hearing. Thus, Plaintiffs need make only a prima facie showing that the court's assertion of jurisdiction is proper. To determine if Plaintiffs have met their burden, the Court will not consider Defendants' Controverting assertions.

B. Constitutional Requirements

The Court may maintain jurisdiction over the non-resident Defendants only in accordance with Tennessee's long-arm statute and the limitations of the Due Process Clause of the Constitution. *See Reynolds v. Int'l Amateur-Athletic Fed'n*, 23 F.3d 1110, 1115 (6th Cir. 1994). Tennessee's long-arm statute permits courts to exercise personal jurisdiction to the

full extent allowed by due process. *See Payne v. Motorists Mut. Ins. Co.*, 4 F.3d 452, 455 (6th Cir. 1993); Tenn. Code Ann. § 20-2-214(a)(6). Thus, Tennessee's long-arm statute and the due process inquiries "merge and the court need only determine whether the assertion of personal jurisdiction . . . violates constitutional due process." *Aristech*, 138 F.3d at 627 (citation omitted).

Minimum contacts are the starting point for a jurisdictional due process analysis. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The nature of the defendant's contact with the forum determines whether general or specific jurisdiction exists. *Compuserve*, 89 F.3d at 1263. General jurisdiction exists when the defendant's contacts with the forum are so "continuous and systematic" that they approximate physical presence, in which case, the forum may exercise "judicial power with respect to any and all claims" against the defendant, regardless of their relation to the defendant's contacts with the forum. *Kerry Steel v. Paragon Indus., Inc.*, 106 F.3d 147, 149 (6th Cir. 1997). If a defendant's contacts are not sufficiently pervasive to confer general jurisdiction, the forum may assert only specific jurisdiction on claims arising from or related to defendant's contacts with the forum. *Id.* In this case, while Plaintiffs do not concede that the Court lacks general jurisdiction over Defendants, Plaintiffs base their prima facie case for jurisdiction on specific jurisdiction.

To make a prima facie showing of specific jurisdiction, a plaintiff must satisfy three criteria: (1) the defendant purposefully availed itself of the benefit of acting in or causing an effect in the forum, (2) the cause of action arises from or is related to defendant' s contacts with the forum, and (3) the defendant's acts or their consequences have a "substantial enough connection with the forum state to make

the exercise of jurisdiction over the defendant reasonable." *Calphalon Corp. v. Rowlette*, 228 F.3d 718, 721 (6th Cir. 2000) (citation omitted); *see also Compuserve*, 89 F.3d at 1263.

The main stricture on exercising jurisdiction under the third criterion of this tripartite test is fairness: the forum's exercise of jurisdiction over the defendant must comport with "traditional notions of fair play and substantial justice." Int'l Shoe, 326 U.S. at 316 (internal quotation marks omitted). Under this principle, the defendant's contacts with the forum must have been sufficient to provide it with "fair warning" that those contacts could establish jurisdiction. *Burger King v. Rudzewicz*, 471 U.S. 462, 472 (1985); *see also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (defendant's activities within the forum must make reasonably foreseeable to defendant the possibility of being haled into a forum court].

Purposeful availment is the "'sine qua non' of [specific] jurisdiction," Dean v. Motel 6 Operating L.P., 134 F.3d 1269, 1273 (6th Cir. 1998). "The true question is not whether an" occurrence giving rise to a cause of action in the forum "was theoretically foreseeable but whether it was reasonable for the [defendant] to anticipate that he would be haled into court in that [forum] because by his own acts he purposefully availed himself of the benefit's of that [forum's] laws and the potential market for his products." *In re Baan Co. Sec. Litig.*, 81 F. Supp.2d 75, 79 (D.D.C. 2000). The main function of the purposeful availment requirement is to prevent nonresident defendants from being haled into court solely as the result of random, attenuated, or fortuitous contacts with the forum. *Burger King*, 471 U.S. at 475.

If the Court determines that a defendant's contacts are sufficient to satisfy due process, it still must determine whether exercising jurisdiction would be prudent. The Court must balance "the burden on the defendant [if subjected to jurisdiction in the forum], the interests of the forum . . . and the plaintiff's interest in obtaining relief," with an eye also to "the interstate judicial system's interest in" judicial economy as well as the interstate interest "in furthering fundamental substantive social policies." *Asahi Metal Indus. Co., Ltd. v. Superior. Ct. of Calif.*, 480 U.S. 102, 113 (1987). The Supreme Court has rejected mechanical application of the jurisdictional tests and has cautioned that the facts of each individual case must be weighed to determine whether asserting jurisdiction would comport with fair play and substantial justice. Euroglas, 107 F.3d at 395 (citing Burger King, 471 U.S. at 485-86).

III. ANALYSIS

A. Plaintiffs' Alleged. Facts Relevant to Jurisdiction Over Henderson, Englar and Nano-Tex.

Mindful of its obligation to ignore Defendants" controverting assertions and to view the facts in the light most favorable to Plaintiffs, the Court finds the following facts relevant to Plaintiffs' prima facie case for jurisdiction over Henderson, Englar, and Nano-Tex:

Plaintiffs concede that Henderson and Englar are not residents of Tennessee and that Nano-Tex is not a Tennessee corporation. Plaintiffs also concede that Henderson, Englar, and Nano-Tex conducted no business in Tennessee with respect to the claims at issue in this case. However, Plaintiffs allege that Henderson and Englar performed their deceptive actions while operating, under the terms of the license

agreement Plaintiffs executed with Burlington Woven and, therefore, should be subject to the choice of law provisions in the agreement.

The license agreement between Plaintiffs and Burlington Woven contains a choice-of-law clause stating that all disputes under the agreement would be decided by Tennessee law in a Tennessee forum. The Burlington Industries employees who had access to Plaintiffs' technology were to provide confidentiality assurances to safeguard Plaintiffs' know-how from disclosure to competitors and other unauthorized persons. At the time the license agreement was executed, Defendants Henderson and Englar were officers of Burlington' Industries, had knowledge of the terms of the license agreement with Burlington Woven, and were required to keep knowledge of Plaintiff's technology confidential.

Plaintiffs submitted the affidavit of Ted Mallen, the president of Intera Corporation, pursuant to the rule that "the non-moving party may not rest upon allegations or denials in his pleadings but his response by affidavit or otherwise must set forth specific facts showing that the court has jurisdiction." *Weller v. Cromwell Oil Co.*, 504 F.2d 927, 929-30 (6th Cir. 1974). Mallen stated that Plaintiffs offer their customers the "latest and most technological advancements in the processing of fabrics" and spend millions of dollars worldwide in the development and marketing of their products and applications. Plaintiffs have license agreements with many companies around the world, and each one contains confidentiality requirements. According to Mallen, each company that executes an agreement with Plaintiffs must elicit strict compliance with Plaintiff's confidentiality requirements from its employees and representatives.

In support of Plaintiffs' contention that Defendants Henderson and Englar are bound by the terms of the license agreement with Burlington Woven, Mallen avers that in 1993, when Plaintiffs originally executed a license agreement with Burlington Woven, (1) Henderson was the chief executive officer of Burlington industries and Englar was its vice president; (2) implementation of the licensing agreement required substantial and regular contact between Plaintiffs and Burlington Industries' officers and representatives; (3) Englar was designated within the license agreement with Burlington Woven as the person to whom Written communication regarding the license agreement should be directed;[5] and (4) Defendants Englar and Henderson had knowledge of the terms of the license agreement.[6]

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[5] Attached to Mallen's affidavit is a copy of a January 19, 1995 (correctly 1996) letter and confidential business memorandum from James E. Klopman, Plaintiffs' vice president of marketing, to Englar. (Docket Entry No. 15, Exh. 1).

[6] Also attached to Mallen's affidavit is a letter dated July II, 1996, from Burlington Fabrics to Mallen. In the agreement between Plaintiffs and Burlington Fabrics, Englar is referenced as an addressee and senior vice president of Burlington Industries (Docket Entry No. 15, Exh. 2). Following the July 11, 1996 letter, Klopman met with Henderson to discuss a perceived lack of good faith on Burlington Fabrics' part in terminating the license agreement on such short notice. While the Burlington Fabrics' license agreement is not the subject of this litigation, Mallen avers that the discussion surrounding this agreement shows that both Englar and Henderson had knowledge of the terms of the license agreement, which were substantially similar to the license agreement between Plaintiffs and Burlington Woven. Further, a letter dated July 18, 1997, from Henderson to Klopman acknowledges the receipt of a knit shirt which was forwarded to him as an example of Plaintiffs' technology. This is further

Mallen contends that Burlington Industries and its officers made no effort to comply with paragraph 2.2 of the license agreement with Burlington Woven, which mandates ninety days written notice by certified mail if Burlington Industries "ever developed any interest in" adopting or utilizing similar technology from any other source . . . ." Mallen later learned that Nano-Tex was created by Henderson and Englar,[7] and that Burlington Industries commenced its relationship with Nano-Tex approximately eighteen months earlier. According to Plaintiffs, these facts show that Henderson and Englar were at all times operating with knowledge of the license agreement with Burlington Woven while misappropriating Plaintiffs' technology for their own use and benefit.

With regard to Nano-Tex, Plaintiffs concede that Nano-Tex has not conducted any business in Tennessee and has no offices, employees, agents, or property in Tennessee. However, Plaintiffs allege that Nano-Tex was a mere alter-ego of Henderson and Englar because they were the principal officers and stockholders of Nano-Tex. Further, Plaintiffs allege that Nano-Tex was created for the sole purpose of circumventing Burlington Industries' obligations to Plaintiffs under the licensing agreements. Henderson and Englar were still working as corporate officers of Burlington Industries at that time and were able to divert customers to Nano-Tex in defiance of the license agreements. Plaintiffs submit that, upon testing Nano-Tex fabric, they discovered that it contained many properties of Plaintiffs' technological

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evidence that Defendants were well aware of Plaintiffs' technology and the license agreements.

[7] Mallen points to Englar's affidavit, in which Englar admits that he had been the director, chief legal and administrative officer, and secretary of Nano-Tex since November 4, 1999.

innovations and know-how. Thus, Plaintiffs assert that the Court has specific jurisdiction over Nano-Tex because it was the vehicle through which Henderson and Englar were able to misappropriate Plaintiffs' technology, trade secrets, and know-how, causing a detrimental effect on Plaintiffs in Tennessee. In sum, Plaintiffs contend that the Court has personal jurisdiction over Henderson and Englar because they are bound by the choice-of-forum clause in the licencing agreement with Burlington Woven and that the Court has personal jurisdiction over Nano-Tex because it is the alter ego of Henderson and Englar.

B. Jurisdiction Over Henderson and Englar

"Where an out-of-state agent is actively and personally involved in the conduct giving rise to the claim, the exercise of personal jurisdiction should depend on traditional notions of fair play and substantial justice; I .e., whether [the agent] purposefully availed [himself] of the forum and the reasonably forseeable consequences of that availment." *Balance Dynamics Corp, v. Schmitt Industries*, 204 F.3d 683, 697 (6th Cir. 2000).

Applying the test to the facts of this case, the Court finds that Plaintiffs have failed to make a prima facie showing that Defendants Henderson and Englar personally availed themselves of the privilege of acting in Tennessee or causing a consequence in Tennessee. Plaintiffs have alleged no facts suggesting Defendants *Henderson* and Englar have ever been to Tennessee (except *Henderson's* admission that he stopped at the Chattanooga airport on a layover), own any property in Tennessee, or have ever personally conducted any business in or involving Tennessee. Plaintiffs do not allege that either Henderson or Englar signed or negotiated the license agreement between Burlington Woven (or Burlington Fabrics

or Burlington Industries for that matter) and Plaintiffs. Of course, those facts are not dispositive because Defendants Henderson and Englar still could have had "minimum-contacts" with Tennessee despite their lack of physical presence. *See Neal*, 270 F.3d at 333.

The Court has carefully reviewed Plaintiffs' brief, portions of the record cited therein, and Mallen's affidavit, and it has not found any incident that brought Defendants Henderson and Englar personally into contact with the State of Tennessee. Plaintiffs point to evidence in the record that shows that Burlington Industries had contacts with Tennessee and that Defendants Henderson and Englar were intimately involved in Burlington Industries' activities, but no mention is made of any personal contacts with the State of Tennessee by Defendants Henderson and Englar, either on their own behalf or in their roles as officers of Burlington Industries. For example, there is no evidence that Defendants Henderson and Englar placed a telephone call, sent a facsimile, mailed a letter, or e-mailed a message to Tennessee. Even the July 1997 letter in which Henderson acknowledged receipt of a knit shirt was mailed to Alabama, not Tennessee. To be sure, Defendants Henderson and Englar were corporate officers of Burlington Industries, which executed license agreements containing Tennessee forum provisions with Plaintiffs, but under *Balance Dynamics*, that is not enough.

Plaintiffs have also failed to meet the third requirement of the *Calphalon* test, because the consequences of Henderson and Englar's business operations do not have a substantial enough connection with Tennessee make the exercise of jurisdiction over them reasonable. *See Compuserve*, 89 F.3d at 1263. The Court notes that the choice-of-law provision in the license agreement is not determinative, and although a choice-of-law provision can "reinforce [a] deliberate

affiliation with the forum State and the reasonable forseeability of possible litigation there," *Burger King*, 471 U.S. at 482, Henderson and Englar were not parties to the license agreements and thus reasonably could not have had warning that they would be subject to jurisdiction in Tennessee. *Id.* at 472.

Thus, even assuming all of Plaintiffs' evidence to be true and making reasonable inferences therefrom, the Court finds that Plaintiffs have failed to make a prima facie showing that the Court has personal jurisdiction over Defendants Henderson and Englar. Therefore, Plaintiffs' claims against them will be dismissed pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure.

C. Jurisdiction over Nano-Tex

"Generally, a corporation is considered an entity separate and distinct from its owners or shareholders." *Flynn v. Greg Anthony Constr. Co.*, 2003 U.S. App. LEXIS 23024, *20 (6th Cir. Nov. 7, 2003) (unpublished). However, the corporate fiction may be ignored in the interest of fairness and equity, which is appropriate "when a corporation is merely an alter-ego of its owners, such that the corporation no longer has a 'separate personality' apart from its owners." *Id.* (citing *Quinn v. Butz*, 510 F.2d 743, 757-58 (D.C. Cir. 1975)). The Sixth Circuit has therefore held that "when a corporation exists solely for the purpose of serving as an alter ego for its owners, the courts will not permit themselves to be blinded or deceived by mere forms or law but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require." *Id.* (citations omitted).

Plaintiffs have failed to allege any facts suggesting that Nano-Tex has any apparent contacts with the State of Tennessee. Because Henderson and Englar were the principal officers and minority shareholders of Nano-Tex, and allegedly created Nano-Tex for the sole purpose of circumventing their obligations pursuant to license agreements between Plaintiffs and Burlington Industries and its subsidiaries, Plaintiffs allege that Nano-Tex is the alter-ego of Henderson and Englar. However, Plaintiffs have made no showing that Nano-Tex was an entity with no separate personality from Henderson and Englar. For example, Plaintiffs have not pled that Henderson and Englar dominated Nano-Tex to the point where it was a "mere facade" of the operations of Henderson and Englar. *See Larabie Coal Co. v. Black*, 672 F.2d 92, 97 (D.C. Cir. 1981).

Plaintiffs have established no proof that Nano-Tex otherwise failed to maintain corporate formalities. *See id.* at 98. Even if jurisdiction existed over Henderson and Englar, there is no evidence that Nano-Tex, as a corporation, was involved in any negotiations between Plaintiffs and Burlington subsidiaries such that Nano-Tex could be haled, into Court in Tennessee.

The Court next considers whether it has jurisdiction over Nano-Tex as a subsidiary of Burlington Industries. "Although a parent company may, under certain circumstances, be subject to personal, jurisdiction based on the contacts of its subsidiary, [there are] few cases that have addressed whether the converse is true, namely whether a subsidiary may be subject to personal jurisdiction based on the contacts of its parent corporation." *MacDonald v. Navistar Int'l*, 143 F.Supp.2d 918, 924 (S.D. Ohio 2001). Typically courts have held that the forum will have jurisdiction over a subsidiary based on the contacts of a parent only when the subsidiary

exercised a large degree of control over the parent, and where the parent acts as an agent of the, subsidiary. *See Blount v. Peerless Chemicals (P.R.) Inc.*, 316 F.2d 695 (2d Cir. 1963); *Henry v. Offshore Drilling Pty. Ltd.*, 331 F.Supp. 340, 341 (E.D.. La. 1971). Alternatively, the Court could conclude that. it has jurisdiction over Nano-Tex if it found that Nano-Tex and Burlington Industries are not really two separate entities. *Allan v. Brown & Root, Inc.*, 491 F.Supp. 398, 403 (S.D. Tex. 1980).

Plaintiffs have pled no facts that would allow the Court to maintain jurisdiction over Nano-Tex based on the conduct of Burlington Industries. Although Nano-Tex is a subsidiary of Burlington Industries, that alone is not enough to subject Nano-Tex to the jurisdiction of this Court based on Burlington industries' contact with this forum. *MacDonald*, 143 F.Supp. 2d at 926. As in MacDonald, Plaintiffs in this case shown "no evidence that [Nano-Tex] reached out to [Tennessee] to conduct business." *Id.* at 927 Additionally, given that the subject of the lawsuit occurred "in [North Carolina] . . . and the lack of evidence to support showings that [Nano-Tex] personally availed itself of the privilege of conducting business in [Tennessee]." *Id.* Although Burlington Industries and Nano-Tex share some officers, "cross-pollination in corporate staffing" is typical of parents and subsidiaries and irrelevant for jurisdictional purposes. Motel 6, 134 F. 3d at 1275. It is not at all clear, that Nano-Tex exercised any degree of control over Burlington Industries. Further, the fact that Henderson and Englar worked for both companies does not necessitate a finding that the two companies are not separate entities. In short, there is simply no evidence with which the Court could find that it has personal jurisdiction over Nano-Tex. Accordingly, Defendants' Motion to Dismiss for lack of personal jurisdiction with respect to Nano-Tex will be GRANTED.

CONCLUSION

Based on the foregoing, Defendants' Motion to Dismiss for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12 (b)(2) will be GRANTED. This case will be DISMISSED WITH PREJUDICE.

An appropriate Order will be entered.

/s/_____
ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE